

FEDERAL DEFENDER SERVICES OF IDAHO

NICOLE OWENS
FEDERAL DEFENDER

MARK ACKLEY
FIRST ASSISTANT

DEBORAH A. CZUBA
CAPITAL HABEAS UNIT

STEVEN RICHERT
POCATELLO TRIAL UNIT

June 7, 2023

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *United States v. Miguel Alaniz*, Case No. 22-30141

Dear Ms. Dwyer,

Pursuant to rule 28(j), I enclose the Third Circuit's recent en banc decision in *Range v. Att'y Gen.*, __F.4th __, 2023 WL 3833404, No. 21-2835 (3d Cir. June 6, 2023) (en banc), which bears on 1) whether Mr. Alaniz is a member of "the people" for purposes of the Second Amendment and 2) whether his conduct in this case—possessing firearms in a way that the district court found was probably not connected to drug trafficking activity—is constitutionally protected.

In *Range*, the Third Circuit rejected the government's argument that the Second Amendment extends only to "law-abiding, responsible citizens," holding that people convicted of felonies presumptively retain their Second Amendment rights. In reaching this result, *Range* rejected any approach to the Second Amendment that "devolves authority to legislators to decide whom to exclude from [the Second Amendment's scope]." *Id.*, slip op. at 14. It rejected this approach because "such extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label." *Id.* (quoting *Folajtar v. Att'y Gen.*, 980 F.3d 897, 912 (3d Cir. 2020) (Bibas, J., dissenting)).

Just as it did in *Range*, the government here argued that "the people" in the Second Amendment refers only to "law-abiding, responsible citizens." *Range* persuasively explains why this argument is wrong. *Id.*, slip op. at 11-15. But *Range* also puts a fine point on why the government's *conduct-based* defense of enhancing Mr. Alaniz's punishment under USSG § 2D1.1(b)(1) must fail. Simply put, if a person's firearm possession can fall outside the Second Amendment's scope so long as the Sentencing Commission has elected to label that conduct as *possession whose connection with drug trafficking is not clearly improbable*—and notwithstanding the fact that a court has separately found that the person

FEDERAL DEFENDER SERVICES OF IDAHO

LAW OFFICES

probably did not possess firearms in connection with drug trafficking¹—then the Commission is ultimately empowered to do exactly what the Third Circuit rightly recognized that the Second Amendment forbids: “manipulate the Second Amendment by choosing a label.” *Id.*, slip op. at 14. *Range* persuasively explains why this is not a permissible result under *Bruen*, and thus persuasively explains why the district court’s decision must be reversed.

Cordially,

/s/ *Miles Pope*

Managing Attorney
Federal Defender Services of Idaho

¹ In finding that Mr. Alaniz was safety-valve eligible, the district court necessarily found that he probably did not engage in the conduct proscribed by USSG § 2D1.1(b)(1), and thus that he probably simply possessed firearms in a way unconnected with drug trafficking. *See United States v. Nelson*, 222 F.3d 545, 550 (9th Cir. 2000) (“[C]onduct which supports a 2D1.1(b)(1) enhancement is the same as conduct which will defeat a defendant’s request for safety valve relief.”).